PUBLIC SERVICE COMMISSION, UTTARANCHAL A

v.

MAMTA BISHT AND ORS.

(Civil Appeal No. 5987 of 2007)

JUNE 03, 2010 B

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Service Law:

Selection – Of Civil Judge (Junior Division) in the State C
of Uttaranchal – Reservation policy adopted by the State – Vertical reservation [i.e. social reservations in favour of SC, ST and OBC under Article 16(4)] and horizontal reservation [i.e. special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3)] – Application of D
horizontal (special) reservation in favour of women – Discussed – Extent of difference between horizontal (special) reservation and vertical (social) reservation re-iterated – Constitution of India , 1950 – Articles 15(3) and 16(4).

Selection – Select list challenged by unsuccessful E
candidate – Writ petition filed – Held: The writ petition could not have been entertained by the High Court since the last selected candidate, a necessary party, was not impleaded – Constitution of India, 1950 – Article 226 – Writ petition – Non-impleadment of necessary party – Code of Civil Procedure, F
1908 – Order I, Rule IX, proviso.

The Public Service Commission, Uttaranchal issued advertisement inviting applications for posts of Civil Judge (Junior Division) with a clarification that the G
reservation policy adopted by the State of Uttaranchal i.e. vertical (social) reservation in favour of SC/ST/OBC and horizontal (special) reservation in favour of handicapped, women etc. belonging to Uttaranchal would be applicable.

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A Respondent no.1 applied in pursuance of the said advertisement seeking benefit of horizontal reservation in favour of Uttaranchal women. She qualified in the written examination but was not selected in the interview.

B Respondent no.1 filed writ petition challenging the select list. The High Court allowed the writ petition and directed the appellants to appoint respondent no.1 as Civil Judge (Junior Division) in the State of Uttaranchal on the ground that horizontal reservation is also to be applied as vertical reservation in favour of reserved category C candidates (social). The High Court held that the last selected woman candidate who was given the benefit of horizontal reservation for Uttaranchal women had secured marks higher than the last selected candidate in general category; that the said candidate ought to have D been appointed against the general category vacancy and respondent no.1 ought to have been offered the appointment giving her the benefit of horizontal reservation for Uttaranchal women.

E The appellants *inter alia* contended before this Court that the writ petition ought to have been dismissed by the High Court for not impleading the necessary parties since not even a single successful candidate was impleaded as a respondent before the High Court. It was further F contended that the High Court had failed to consider the principle that if a reserved category candidate secures more marks than the last selected candidate in general category, then he is to be appointed against the general category vacancy, does not apply while giving the benefit of horizontal reservation. G

Allowing the appeals, the Court

HELD:1. In case respondent no.1 wanted her selection against the reserved category vacancy, the last H selected candidate in that category was a necessary party

and without impleading her, the writ petition could not have been entertained by the High Court. If a person, who is likely to suffer from the order of the Court, has not been impleaded as a party, he has a right to ignore the said order as it has been passed in violation of the principles of natural justice. Moreso, proviso to Order I, Rule IX of CPC provides that non-joinder of necessary party be fatal. Though the provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141 CPC but the principles enshrined therein are applicable. [Paras 7 and 8] [297-B-G]

Udit Narain Singh Malpaharia v. Additional Member, Board of Revenue, Bihar & Anr. **AIR 1963 SC 786;** *Gulabchand Chhotalal Parikh v. State of Gujarat* **AIR 1965 SC 1153;** *Babubhai Muljibhai Patel v. Nandlal, Khodidas Barat & Ors.* **AIR 1974 SC 2105;** *Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior & Ors.* **AIR 1987 SC 88;** *Prabodh Verma & Ors. v. State of U.P. & Ors.* **AIR 1985 SC 167 and** *Tridip Kumar Dingal & Ors. v. State of West Bengal & Ors.* **(2009) 1 SCC 768, relied on.**

Rakhi Ray & Ors. v. The High Court of Delhi & Ors. **AIR 2010 SC 932, referred to.**

2. There is a difference between the nature of vertical reservation [i.e. social reservations in favour of SC, ST and OBC under Article 16(4)] and horizontal reservation [i.e. special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3)]. The view taken by the High Court on application of horizontal reservation is contrary to the law laid down by this Court. In an earlier case, it has been laid down by this Court that where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-

A reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the B percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. But the aforesaid principle applicable to vertical C (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out D the number of candidates among them who belong to the special reservation group of "Scheduled Caste women". If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special E reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus F women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Since the judgment of the High Court is not in consonance with law laid down by this Court in the said earlier case, it is liable to be set aside and all G consequential orders become unenforceable and inconsequential. [Paras 13, 14] [299-B-H; 300-A-C]

Rajesh Kumar Daria v. Rajasthan Public Service Commission & Ors. AIR 2007 SC 3127, relied on.

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Indra Sawhney v. Union of India **AIR 1993 SC 477, referred to.** A

Case Law Reference:

AIR 2010 SC 932	**referred to**	**Para 6**
AIR 1963 SC 786	**relied on**	**Para 7**
AIR 1965 SC 1153	**relied on**	**Para 7**
AIR 1974 SC 2105	**relied on**	**Para 7**
AIR 1987 SC 88	**relied on**	**Para 7**
AIR 1985 SC 167	**relied on**	**Para 8**
(2009) 1 SCC 768	**relied on**	**Para 8**
AIR 1993 SC 477	**referred to**	**Para 10**
AIR 2007 SC 3127	**relied on**	**Para 13**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5987 of 2007.

From the Judgment & Order dated 26.10.2005 of the High Court of Uttaranchal at Nainital in Writ Petition No. 780 of 2003 (M/B). E

WITH

C.A. No. 5982 of 2007 F

R. Venkataramani, S.S. Shamshery (for Jatinder Kumar Bhatia), A.S. Rawat, Rajiv Kumar Bansal (for Raj Singh Rana), Ashok K. Mahajan, Mukesh K. Giri for the appearing parties. G

The Judgment of the Court was delivered by

DR. B. S. CHAUHAN, J. 1. These appeals have been preferred by the Public Service Commission and the State Government of Uttaranchal being aggrieved of the judgment and H

A order of the High Court of Uttaranchal, Nainital dated 26.10.2005 allowing the Writ Petition No.780 of 2003 (M/B) and directing the present appellants to appoint respondent No.1- Ms. Mamta Bisht as Civil Judge, Junior Division in the State of Uttaranchal.

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2. Facts and circumstances giving rise to these appeals are that Public Service Commission, Uttaranchal (hereinafter referred to as the 'Commission') issued an advertisement dated 7.6.2002 inviting applications for 35 posts of Civil Judge, (Junior Division) with a stipulation that the number of vacancies C may be increased or decreased. It clarified that the reservation policy adopted by the State i.e. reservation in favour of SC/ST/ OBC and horizontal reservation in favour of handicapped, and women etc. belonging to Uttaranchal would be applicable. Respondent No.1 applied in pursuance of the said D advertisement seeking benefit of reservation in favour of Uttaranchal women. She qualified in the written examination and thus faced the interview held by the Commission. The final result of the selection was declared on 31.7.2003 and it was evident from the result that respondent No.1 was not selected. E Instead of filling of 35 vacancies, recommendations to fill up 42 vacancies were made as the decision had been taken in this regard prior to declaration of result. Out of 42 posts, 26 were filled up by general category and 16 by reserved category candidates. Some women candidates stood selected in F general category while others had been given the benefit of horizontal reservation being resident of Uttaranchal. Respondent No.1, being aggrieved preferred Writ Petition No.780 of 2003 (M/B) in the High Court of Uttaranchal seeking quashment of select list dated 31.7.2003 mainly on the ground G that women candidates belonging to Uttaranchal had secured marks making them eligible to be selected in general category and had it been done so, respondent No.1 could have been selected in reserved category being a woman of Uttaranchal. It had also been pleaded in the petition that some of the women H candidates who not only claimed the benefit of horizontal

reservation but have been selected giving the said benefit, did not submit their respective certificate of domicile at the time of filling up the application forms but they produced the said certificate at a later stage and it was accepted. The High Court accepted the first submission of respondent No.1 after examining the record of selection and came to the conclusion that last selected woman candidate who was given benefit of horizontal reservation for Uttaranchal women had secured marks higher than the last selected candidate in general category. Thus, the said candidate ought to have been appointed against the general category vacancy and respondent No.1 ought to have been offered the appointment giving her the benefit of horizontal reservation for Uttaranchal women. Hence, these appeals.

3. Shri S.S. Shamshery, Advocate appearing for the Commission and Shri Ashok Mahajan, Advocate appearing for the High Court have submitted that all the vacancies advertised had already been filled up before the writ petition could be filed. Not a single successful candidate had been impleaded as a respondent before the High Court. Thus, the petition ought to have been dismissed for not impleading the necessary parties. The High Court did not consider the issue of acceptance of domicile certificates by the Uttaranchal women at a belated stage nor any finding has been recorded on the said issue. The High Court failed to consider the principle that if a reserved category candidate secures more marks than the last selected candidate in general category, then he is to be appointed against the general category vacancy, does not apply while giving the benefit of horizontal reservation. The writ petition filed by the respondent did not have any factual foundation or proper pleadings and thus was not worth entertaining. It is well neigh impossible to implement the judgment of the High Court at this belated stage, for the reasons that all the vacancies advertised stood filled up in 2003. Subsequent to the selection involved herein appointments have been made several times. Judicial Officers appointed from the said selection have been promoted

A as Civil Judge (Senior Division). Respondent No.1 cannot be given seniority over and above the officers appointed in subsequent selections. Thus, appeals deserve to be allowed.

4. On the contrary, Shri R. Venkataramani, learned senior B counsel appearing for respondent No.1 has vehemently opposed the appeals contending that great injustice has been done to respondent No.1. She has succeeded before the High Court on the sole ground that the last selected candidate receiving the benefit of horizontal reservation in favour of C Uttaranchal women could be appointed against the general category vacancy and the respondent No.1 ought to have been selected giving her the benefit of horizontal reservation in favour of Uttaranchal women. There are still some vacancies from the said selection as two successful candidates have resigned after joining. Thus, respondent No.1 can be adjusted against D one of such vacancies. Respondent No.1 has been issued appointment letter dated 17.5.2010 in pursuance of the impugned judgment, but has not yet been given posting by the High Court. Thus, she could not join the service. Thus, the appeals are liable to be dismissed.

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5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. It is settled legal proposition that vacancies over and above the number of vacancies advertised cannot be filled up. F Once all the vacancies are filled up, the selection process comes to an end. In case a selected candidate after joining resigns or dies, the vacancy, so occurred cannot be filled up from the panel, which stood already exhausted. (Vide *Rakhi Ray & Ors. Vs. The High Court of Delhi & Ors.* AIR 2010 SC G 932).

However, in the instant case, the advertisement itself made it clear that the vacancies could be increased and decreased and before completion of the selection process, a decision had

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been taken to fill up 42 instead of 35 vacancies and reservation policy had been implemented accordingly.

7. In case the respondent No.1 wanted her selection against the reserved category vacancy, the last selected candidate in that category was a necessary party and without impleading her, the writ petition could not have been entertained by the High Court in view of the law laid down by nearly a Constitution Bench of this Court in *Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar & Anr.*, AIR 1963 SC 786, wherein the Court has explained the distinction between necessary party, proper party and proforma party and further held that if a person who is likely to suffer from the order of the Court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. More so, proviso to Order I, Rule IX of Code of Civil Procedure, 1908 (hereinafter called CPC) provide that non-joinder of necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141 CPC but the principles enshrined therein are applicable. (Vide *Gulabchand Chhotalal Parikh Vs. State of Gujarat;* AIR 1965 SC 1153; *Babubhai Muljibhai Patel Vs. Nandlal, Khodidas Barat & Ors.*, AIR 1974 SC 2105; and *Sarguja Transport Service Vs. State Transport Appellate Tribunal, Gwalior & Ors.* AIR 1987 SC 88).

8. In *Prabodh Verma & Ors. Vs. State of U.P. & Ors.* AIR 1985 SC 167; and *Tridip Kumar Dingal & Ors. Vs. State of West Bengal & Ors.* (2009) 1 SCC 768), It has been held that if a person challenges the selection process, successful candidates or at least some of them are necessary parties.

9. All the 42 vacancies had been filled up, implementing the reservation policy. All the women candidates selected from reserved category indisputably belong to Uttaranchal and none of them is from another State.

A 10. The High Court decided the case on the sole ground that as the last selected candidate, receiving the benefit of horizontal reservation had secured marks more than the last selected general category candidate, she ought to have been appointed against the vacancy in general category in view of B the judgment of this Court in *Indra Sawhney Vs. Union of India,* AIR 1993 SC 477, and the Division Bench judgment of High Court of Uttaranchal in Writ Petition No.816/2002 (M/B) (*Km. Sikha Agarwal Vs. State of Uttaranchal & Ors.*) decided on 16.4.2003, and respondent no.1 ought to have appointed giving C benefit of reservation thus, allowed the writ petition filed by respondent No.1.

11. In fact, the High Court allowed the writ petition only on the ground that the horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidates D (social) as it held as under:

> "In view of above, Neetu Joshi (Sl.No.9, Roll No.12320) has wrongly been counted by the respondent No.3/Commission against five seats reserved for E Uttaranchal Women General Category as she has competed on her own merit as general candidate and as 5th candidate the petitioner should have been counted for Uttaranchal Women General Category seats."

F 12. Admittedly, the said Neetu Joshi has not been impleaded as a respondent. It has been stated at the Bar that an application for impleadment had been filed but there is nothing on record to show that the said application had ever been allowed. Attempt had been made to implead some successful candidates before this Court but those applications G stood rejected by this Court.

13. The view taken by the High Court on application of horizontal reservation is contrary to the law laid down by this Court in *Rajesh Kumar Daria Vs. Rajasthan Public Service*

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Commission & Ors. AIR 2007 SC 3127, wherein dealing with a similar issue this Court held as under:

"9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide *Indra Sawhney, R.K. Sabharwal* v. *State of Punjab, Union of India* v. *Virpal Singh Chauhan* and *Ritesh R. Sah* v. *Dr.Y.L. Yamul.*) But *the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations.* Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Caste women". *If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota.* Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken

A by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. *To this extent, horizontal (special) reservation differs from vertical (social) reservation.* Thus women selected on merit within the vertical reservation quota will be counted against the B horizontal reservation for women." (Emphasis added)

14. In view of the above, it is evident that the judgment and order of the High Court is not in consonance with law laid down by this Court in *Rajesh Kumar Daria* (supra). The judgment and order impugned herein is liable to be set aside and all C consequential orders become unenforceable and inconsequential.

Thus, appeals succeed and are allowed. Judgment and order of the High Court dated 26.10.2005 passed in Writ D Petition no.780/2003 (M/B) is hereby set aside. No costs.

B.B.B. Appeals allowed.